



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/06324/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 24 October 2018**

**Determination  
Promulgated  
On 21 November 2018**

**Before**

**UPPER TRIBUNAL JUDGE CONWAY**

**Between**

**MRS JENNIFER WEXLER  
(No anonymity order made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss Sharkey of Counsel

For the Respondent: Mr Clarke, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of the United States of America born in 1979. She appealed against a decision of the respondent made on 4 May 2017 to refuse her application, which was made on 22 October 2016, for indefinite leave to remain based on ten years long residence. The application was refused under paragraph 276D with reference to paragraph 276B(i)(a) of the Immigration Rules.

2. The basis of the refusal was that the appellant during the period in question had been absent from the UK for a total of 752 days which exceeded the permitted period of 18 months (540 days). Her explanation was that the absences were for family visits, holidays, academic research and field work. She is an archaeologist who was involved in research for her PhD. The respondent did not consider the reason to be exceptional such that discretion should be exercised in her case.
3. She appealed.

### **First-tier Hearing**

4. Her case was dealt with at her request “on papers” (without an oral hearing). In a decision promulgated on 12 September 2017 Judge of the First-tier McGavin dismissed the appeal under the Immigration Rules and on human rights grounds.
5. In summary, the judge found that the excess of the appellant’s absences, over 18 months had not occurred in circumstances which were exceptional, unavoidable or of a compassionate nature. The respondent’s decision to decline to exercise her discretion was one that was reasonably arrived at. Nor were there circumstances that produced unjustifiably harsh results for a grant of leave outside the Rules.
6. She sought permission to appeal which was refused but was granted on 15 May 2018 on reapplication to the Upper Tribunal.
7. At the error of law hearing on 25 July 2018 before me, Mr Kotas, who appeared for the respondent, agreed that the First-tier decision showed material error of law. It was noted that on 7 July 2017 a bundle was received from the appellant which was not sent to the judge prior to her decision being promulgated. Such material was relevant to the judge’s consideration of paragraph 276B of the Rules and Article 8 ECHR. The failure, albeit through no fault of the judge, to consider the material lodged on 7 July 2017 was a procedural irregularity such as to amount to an error of law.
8. By consent the decision of the First-tier Tribunal was set aside to be remade.
9. Following discussion as to the appropriate way to proceed I set the matter down for a resumed hearing on a later date. Thus, the matter came before me again on 24 October 2018.
10. Mr Clarke and Miss Sharkey noted that as of early August 2018 the appellant had shown 10 years continuous lawful residence and was within the permitted period for time spent abroad. By joint motion I was asked to allow the appeal. I did so.

**Notice of Decision**

The decision of the First-tier Tribunal showed material error of law. It is set aside and remade as follows:

The appeal is allowed.

No anonymity order made.

Signed

Date: 16 November 2018

Upper Tribunal Judge Conway